

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

February 21, 2008

In the Matter of

Docket No. 2005-242

File No. 368

Arlex Oil Corporation

Lexington

Decision after Remand

In a Final Decision, the Commissioner of the Department of Environmental Protection (the "Department") adopted a recommended decision of a Presiding Officer, dismissing the appeal of the Petitioner, Mr. Susnock, for lack of standing and failure to state a claim upon which relief may be granted. Mr. Susnock is an abutter to Arlex Oil Corporation, to which the Department had issued a renewal of a hazardous waste transport license allowing Arlex to transport hazardous wastes in compliance with M.G.L. c. 21C and 310 CMR 30.000. Mr. Susnock filed an appeal with the Superior Court pursuant to M.G.L. c. 30A, s. 14. The case was remanded to the Department for further clarification of the issues of Mr. Susnock's standing and possible hazardous waste storage at Arlex Oil Corporation. Specifically, the court sought clarification of facts in the record related to the storage of hazardous waste, the Department's Notice of Noncompliance, and the references in the Lexington Fire Chief's letter to storage tanks that were not addressed in the agency decision. Further, the court questioned whether

Mr. Susnock might have standing as an abutter, as his proximity suggested he was not merely presenting public concerns. I provide the requested clarification.¹

Status of Arlex under the Hazardous Waste Regulations

The Department's regulations define hazardous waste and then specify requirements based upon the activity of an entity as a generator, a transporter, or a treatment, storage, and disposal facility. See 310 CMR 30.010; 310 CMR 30.302. An entity may engage in more than one activity, in which case it must comply with more than one set of requirements. Arlex is both a generator and a transporter, but is not a treatment, storage, and disposal facility. A generator may "accumulate" hazardous wastes on a short-term basis upon its premises as allowed by the regulations without triggering the requirements for "storage" of waste. See 310 CMR 30.010, definitions of "accumulation" and "storage." This distinction between "accumulation" and "storage" has regulatory consequences as to the generator, as well as to abutters and the public.

Arlex is a small quantity generator, which means that it generates less than 1,000 kilograms in a month, accumulation is limited to 6000 kilograms in tanks and containers, and the waste must be shipped within 180 days. 310 CMR 30.351.² A generator does not need a license or permit, but must submit a notification form to obtain an identification number and must comply with applicable volume and time limits. There are also regulations setting accumulation area standards, standards for tanks and containers, and requirements for emergency preparation and response. See, e.g., 310 CMR 30.303, 310

¹ The Department filed a Motion for Revised Final Decision after the remand. Mr. Susnock did not file a response. With its motion, the Department filed a copy of the Notice of Noncompliance referenced in the remand. The Notice of Noncompliance had not previously been part of the administrative record because it was not relevant to the transport license issued to Arlex.

² Generators are divided into three categories (large, small, and very small) and the categories are determined by the rate the hazardous waste is generated and the amount accumulated.

CMR 30.351(8) – (9).³ No public notice or appeal rights are associated with identification as a small quantity generator or the submittal of a notification form. An abutter such as Susnock does not receive individual notice of and may not challenge the status of a generator such as Arlex.

The Department's Enforcement Action

When a generator fails to obtain an identification number, to conform to the time and volume limitations, or to comply with the standards, these violations of the regulations are subject to enforcement by the Department. The Notice of Noncompliance issued by the Department to Arlex in 2005 cites violations related to its activities as a generator of waste oil, not to violations of its transport license.⁴ Specifically, the Department cited Arlex for violation of regulations related to burning of waste oil, labeling containers and storage areas for waste oil, and transport of off-site waste oil not subject to licensing. 310 CMR 30.205(19), 310 CMR 30.222(5)(b), 310 CMR 253(6)(b), 310 CMR 254(6)(e). These requirements are imposed upon Arlex as a generator by the regulations themselves, and are not related to its activities as a transporter of hazardous waste or by the transport license.

In response to the Notice of Noncompliance, Arlex submitted a letter describing its activities to comply with the regulations. The Department then issued a “return to compliance” letter, stating that after a follow up inspection on August 22, 2005 and a review of company records the Department had determined that Arlex had complied with

³A Summary of Requirements for Small Quantity Generators of Hazardous Wastes, Updated June 2004, prepared by the Massachusetts Department of Environmental Protection is available at its website.

⁴ The Department's Inspection Report and Memorandum to the File dated June 2, 2005 and prepared subsequent to a site visit by Department staff noted “no transporter violations found. Accumulation violations found.” See Attachment B to Susnock's Memorandum of Law in Support of the Motion for Judgment on the Pleadings. This attachment also includes a letter from Arlex to the Department indicating the actions it took to return to compliance.

the requirements identified in the Notice of Noncompliance. The record supports a conclusion that the Department inspected the site, cited Arlex for violations related to its status as a generator, Arlex took steps to correct the violations, and the Department determined after a follow up inspection that Arlex was in compliance.

The permitting and licensing of storage of flammable and combustible materials is regulated by the Massachusetts Fire Prevention regulations at 527 CMR 14.03 under separate statutory authority. The use of the term “storage” to describe the tanks by the Lexington Fire Department does not mean that there is “storage” – as opposed to accumulation – within the context of 310 CMR 30.000. The memo from the Lexington Fire Department indicates that Arlex had the requisite permits for underground storage tanks, as well as above ground tanks. The presence of underground or above ground tanks does not necessarily signal a violation of M.G.L. c. 21C and 310 CMR 30.000; on the contrary, tanks must be used in accordance with both the Department’s regulations and the Fire Department’s permits.

The Transport License and Standing to Appeal

Transporters of hazardous waste must have a license from the Department, and comply with requirements for insurance coverage, bonding, recordkeeping, reporting, and fees. 310 CMR 30.401 to 310 CMR 30.416. With quite limited exceptions, hazardous waste must be shipped expeditiously from the generator to a treatment, storage and disposal facility. 310 CMR 30.408(1). Discharges of hazardous waste in transit must be addressed immediately to protect public health, safety, and the environment. 310 CMR 30.413. Unlike generators operating under a notification, the issuance of a license to a transporter includes public notice and appeal rights. 310 CMR 30.834; 310 CMR 30.890.

Under the hazardous waste management regulations, “any person aggrieved by a determination by the Department to issue . . . any license or approval” may request an adjudicatory hearing. 310 CMR 30.890. The license issued by the Department allows the transport of materials only; the notification filed by Arlex is not an approval that may be appealed. An aggrieved person is defined as “any person who is or may become a ‘party’ or ‘intervenor’ pursuant to 310 CMR 1.01. The relevant question is therefore whether Mr. Susnock has shown that he is “substantially and specifically affected” by the proceeding. 310 CMR 1.01(1)(c); 310 CMR 1.01(7)(d). This showing includes an allegation of a concrete injury the person is likely to suffer as a result of the Department’s decision, a nexus between the relief sought and the subject matter of the proceeding, interests that are arguably within the zone of interests of the regulations, and that the relief will alleviate the alleged harm. Matter of Allen Krasnecky, Matter of Coastal Energy, Inc., Docket No. 2003-101, 2003-102, 2003-122, Ruling on Motion to Intervene (March 10, 2004).

Mr. Susnock’s status as an abutter does not confer standing under the hazardous waste regulations. Compare 310 CMR 10.05(7) (a)4. (specifically granting appeal rights to abutters under the wetlands regulations; revised effective October 31, 2007 to eliminate abutter standing). Mr. Susnock claims that he is substantially and specifically affected through his ownership of abutting property, and states concerns about the storage of hazardous waste at the site and transportation to and from the site. He claims an injury from a previous spill, the relief of withholding the license to avoid further spills during transport, and a strong interest in the protection of environmental laws.

The scope of the hazardous waste regulations is broad. 310 CMR 30.000. The concerns expressed by Mr. Susnock as an abutter are related to the containment and accumulation of hazardous materials that are governed by the generator requirements in the regulations. The activities of Arlex as a generator are not the subject matter of this proceeding. The Department issued a renewal of a license to transport hazardous materials, an activity that takes place on the public ways of the Commonwealth. The purpose of these regulatory provisions is the protection of the public. Abutters do not have any special status under the regulations; they do not receive individual notice of an application and may participate in the comment period as any member of the general public. See 310 CMR 30.834; compare 310 CMR 10.05(4)(a)(abutters under Wetlands Protection Act receive individual notice).

Although abutters to a generator, like abutters to public ways more frequently traveled by vehicles transporting hazardous wastes, may be affected in a way that differs in kind or magnitude than the general public, this difference is not, as a matter of law, an injury within the scope of interests protected by the transport license provisions. See Robert W. Higgins, Trustee v. Department of Environmental Protection , 69 Mass. App. Ct. 158 (2005) (abutters of property subject to c. 91 waterways license not aggrieved; interests protected are public interests). Again, the accumulation of hazardous waste by generators as allowed by the regulations upon notification is not the subject of the transport license. Although the Department may consider a generator's compliance history when determining whether to issue a transport license, the prompt return to compliance documented in the record would not support denial of a transport license, the remedy sought by Mr. Susnock. The Department has, and will continue to, exercise its

enforcement authority over Arlex to ensure compliance with both the requirements applicable to a generator and to a licensed transporter of hazardous materials.

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Laurie Burt
Commissioner